

SENATE BILL 3203
By Gilbert

AN ACT to amend Tennessee Code Annotated, Title 8; Title 50 and Title 56, relative to drug-free workplaces.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. The title of this act is, and may be cited as, the "Drug-Free Workplaces Act of 1996".

SECTION 2. Tennessee Code Annotated, Title 50, is amended by adding the following as a new chapter:

Section 50-__-__01.

(a) It is the intent of the general assembly to promote drug-free workplaces in order that employers in the state be afforded the opportunity to maximize their levels of productivity, enhance their competitive positions in the marketplace, and reach their desired levels of success without experiencing the costs, delays, and tragedies associated with work-related accidents resulting from drug abuse by employees. It is further the intent of the general assembly that drug abuse be discouraged and that employees who choose to engage in drug abuse face the risk of unemployment and the forfeiture of workers' compensation benefits.

(b) If an employer implements a drug-free workplace program in accordance with this chapter which includes notice, education, and procedural requirements for testing for drugs and alcohol pursuant to rules developed by the division of workers' compensation, the employer may require the employee to submit to a test for the presence of drugs or alcohol and, if a drug or alcohol is

found to be present in the employee's system at a level prescribed by rule adopted pursuant to this act, the employee may be terminated and forfeits his or her eligibility for medical and indemnity benefits. However, a drug-free workplace program must require the employer to notify all employees that it is a condition of employment for an employee to refrain from reporting to work or working with the presence of drugs or alcohol in his or her body and, if an injured employee refuses to submit to a test for drugs or alcohol, the employee forfeits eligibility for medical and indemnity benefits.

Section 50-__-__02. Sections 50-__-__03 through 50-__-__13, inclusive, apply to a drug-free workplace program implemented pursuant to rules adopted by the commissioner of labor.

Section 50-__-__03. Except where the context otherwise requires, as used in this act:

(1) "Chain of custody" refers to the methodology of tracking specified materials or substances for the purpose of maintaining control and accountability from initial collection to final disposition for all such materials or substances and providing for accountability at each stage in handling, testing, and storing specimens and reporting test results.

(2) "Confirmation test," "confirmed test" or "confirmed drug test" means a second analytical procedure used to identify the presence of a specific drug or metabolite in a specimen, which test must be different in scientific principle from that of the initial test procedure and must be capable of providing requisite specificity, sensitivity, and quantitative accuracy.

(3) "Drug" means alcohol, including a distilled spirit, wine, a malt beverage, or an intoxicating liquor; an amphetamine; a canuabinoid; cocaine; phencyclidine (PCP); a hallucinogen; methaqualone; an opiate; a barbiturate; a benzodiazepine; a synthetic narcotic; a designer drug; or a metabolite of any of

the substances listed in this paragraph. An employer may test an individual for any or all of such drugs.

(4) "Drug rehabilitation program" means a service provider that provides confidential, timely, and expert identification, assessment, and resolution of employee drug abuse.

(5) "Drug test" or "test" means any chemical, biological, or physical instrumental analysis administered by a laboratory certified by the United States department of health and human services or licensed by the department of health for the purpose of determining the presence or absence of a drug or its metabolites.

(6) "Employee" means any person who works for salary, wages, or other remuneration for an employer.

(7) "Employee assistance program" means an established program capable of providing expert assessment of employee personal concerns; confidential and timely identification services with regard to employee drug abuse; referrals of employees for appropriate diagnosis, treatment, and assistance; and follow-up services for employees who participate in the program or require monitoring after returning to work. If, in addition to the above activities, an employee assistance program provides diagnostic and treatment services, these services shall in all cases be provided by the program.

(8) "Employer" means a person or entity that employs a person and that is covered by the Workers' Compensation Law.

(9) "Initial drug test" means a sensitive, rapid, and reliable procedure to identify negative and presumptive positive specimens, using an immunoassay procedure or an equivalent, or a more accurate scientifically accepted method approved by the United States food and drug administration or the department of

health as such more accurate technology becomes available in a cost-effective form.

(10) "Job applicant" means a person who has applied for a position with an employer and has been offered employment conditioned upon successfully passing a drug test, and may have begun work pending the results of the drug test. For a public employer, "job applicant" means only a person who has applied for a special-risk or safety-sensitive position.

(11) "Medical review officer" or "MRO" means a licensed physician, employed with or contracted with an employer, who has knowledge of substance abuse disorders, laboratory testing procedures, and chain of custody collection procedures; who verifies positive, confirmed test results; and who has the necessary medical training to interpret and evaluate an employee's positive test result in relation to the employee's medical history or any other relevant biomedical information.

(12) "Prescription or nonprescription medication" means a drug or medication obtained pursuant to a prescription or a medication that is authorized pursuant to federal or state law for general distribution and use without a prescription in the treatment of human diseases, ailments, or injuries.

(13) "Public employer" means any agency within state, county, or municipal government that employs individuals for a salary, wages, or other remuneration.

(14) "Reasonable-suspicion drug testing" means drug testing based on a belief that an employee is using or has used drugs in violation of the employer's policy drawn from specific objective and articulable facts and reasonable inferences drawn from those facts in light of experience. Among other things, such facts and inferences may be based upon:

(A) Observable phenomena while at work, such as direct observation of drug use or of the physical symptoms or manifestations of being under the influence of a drug;

(B) Abnormal conduct or erratic behavior while at work or a significant deterioration in work performance;

(C) A report of drug use, provided by a reliable and credible source;

(D) Evidence that an individual has tampered with a drug test during his employment with the current employer;

(E) Information that an employee has caused, contributed to, or been involved in an accident while at work; or

(F) Evidence that an employee has used, possessed, sold, solicited, or transferred drugs while working or while on the employer's premises or while operating the employer's vehicle, machinery, or equipment.

(15) "Safety-sensitive position" means, with respect to a public employer, a position in which a drug impairment constitutes an immediate and direct threat to public health or safety, such as a position that requires the employee to carry a firearm, perform life-threatening procedures, work with confidential information or documents pertaining to criminal investigations, or work with controlled substances; or a position in which a momentary lapse in attention could result in injury or death to another person.

(16) "Specimen" means tissue, hair, or a product of the human body capable of revealing the presence of drugs or their metabolites, as approved by the United States Food and Drug Administration or the department of health.

Section 50-__-__04. An employer may test an employee or job applicant for any drug described in Section 50-__-__03(3). In order to qualify as having established a

drug-free workplace program which affords an employer the ability to qualify for the discounts provided under Section 3 and deny medical and indemnity benefits, under this chapter all drug testing conducted by employers shall be in conformity with the standards and procedures established in this section and all applicable rules adopted pursuant to this section. However, an employer does not have a legal duty under this section to request an employee or job applicant to undergo drug testing. If an employer fails to maintain a drug-free workplace program in accordance with the standards and procedures established in this section and in applicable rules, the employer shall not be eligible for discounts under Section 3. All employers qualifying for and receiving discounts provided under Section 3 must be reported annually by the insurer to the division.

Section 50-__-__05.

(a) One time only, prior to testing, an employer shall give all employees and job applicants for employment a written policy statement which contains:

(1) A general statement of the employer's policy on employee drug use, which must identify:

(A) The types of drug testing an employee or job applicant may be required to submit to, including reasonable-suspicion drug testing or drug testing conducted on any other basis; and

(B) The actions the employer may take against an employee or job applicant on the basis of a positive confirmed drug test result;

(2) A statement advising the employee or job applicant of the existence of this section;

(3) A general statement concerning confidentiality;

(4) Procedures for employees and job applicants to confidentially report to a medical review officer the use of prescription or nonprescription medications both before and after being tested;

(5) A list of the most common medications, by brand name or common name, as applicable, as well as by chemical name, which may alter or affect a drug test. A list of such medications as developed by the department of health shall be available to employers through the division of workers' compensation of the department of labor;

(6) The consequences of refusing to submit to a drug test;

(7) A representative sampling of names, addresses, and telephone numbers of employee assistance programs and local drug rehabilitation programs;

(8) A statement that an employee or job applicant who receives a positive confirmed test result may contest or explain the result to the medical review officer within five (5) working days after receiving written notification of the test result; that if an employee's or job applicant's explanation or challenge is unsatisfactory to the medical review officer, the medical review officer shall report a positive test result back to the employer; and that a person may contest the drug test result pursuant to rules adopted by the department of labor;

(9) A statement informing the employee or job applicant of his responsibility to notify the laboratory of any administrative or civil action brought pursuant to this section;

(10) A list of all drugs for which the employer will test, described by brand name or common name, as applicable, as well as by chemical name;

(11) A statement regarding any applicable collective bargaining agreement or contract and the right to appeal to the civil service commission or applicable court; and

(12) A statement notifying employees and job applicants of their right to consult with a medical review officer for technical information regarding prescription or nonprescription medication.

(b) An employer not having a drug-testing program shall ensure that at least sixty (60) days elapse between a general one-time notice to all employees that a drug-testing program is being implemented and the beginning of actual drug testing. An employer having a drug-testing program in place prior to July 1, 1996, is not required to provide a sixty (60) day notice period.

(c) An employer shall include notice of drug testing on vacancy announcements for positions for which drug testing is required. A notice of the employer's drug-testing policy must also be posted in an appropriate and conspicuous location on the employer's premises, and copies of the policy must be made available for inspection by the employees or job applicants of the employer during regular business hours in the employer's personnel office or other suitable locations.

Section 50-___-___06.

(a) An employer is required to conduct the following types of drug tests:

(1) Job applicant drug testing. An employer must require job applicants to submit to a drug test and may use a refusal to submit to a drug test or a positive confirmed drug test as a basis for refusing to hire a job applicant;

(2) Reasonable-suspicion drug testing. An employer must require an employee to submit to reasonable-suspicion drug testing;

(3) Routine fitness-for-duty drug testing. An employer must require an employee to submit to a drug test if the test is conducted as part of a routinely scheduled employee fitness-for-duty medical examination that is part of the employer's established policy or that is scheduled routinely for all members of an employment classification or group; and

(4) Follow-up drug testing. If the employee in the course of employment enters an employee assistance program for drug-related problems, or a drug rehabilitation program, the employer must require the employee to submit to a drug test as a follow-up to such program, unless the employee voluntarily entered the program. In those cases, the employer has the option to not require follow-up testing. If follow-up testing is required, it must be conducted at least once a year for a two (2) year period after completion of the program. Advance notice of a follow-up testing date must not be given to the employee to be tested.

(b) This subsection does not preclude a private employer from conducting random testing, or any other lawful testing, of employees for drugs.

(c) Limited testing of applicants, only if it is based on a reasonable classification basis, is permissible in accordance with division rule.

Section 50-___-___07. All specimen collection and testing for drugs under this section shall be performed in accordance with the following procedures:

(a) A sample shall be collected with due regard to the privacy of the individual providing the sample, and in a manner reasonably calculated to prevent substitution or contamination of the sample.

(b) Specimen collection must be documented, and the documentation procedures shall include:

(1) Labeling of specimen containers so as to reasonably preclude the likelihood of erroneous identification of test results; and

(2) A form for the employee or job applicant to provide any information he considers relevant to the test, including identification of currently or recently used prescription or nonprescription medication or other relevant medical information. The form must provide notice of the most common medications by brand name or common name, as applicable, as well as by chemical name, which may alter or affect a drug test. The providing of information shall not preclude the administration of the drug test, but shall be taken into account in interpreting any positive confirmed test result.

(c) Specimen collection, storage, and transportation to the testing site shall be performed in a manner that reasonably precludes contamination or adulteration of specimens.

(d) Each initial drug test and confirmation test conducted under this section, not including the taking or collecting of a specimen to be tested, shall be conducted by a licensed or certified laboratory as described in Section 50-___-___11.

(e) A specimen for a drug test may be taken or collected by any of the following persons:

(1) A physician, a physician assistant, a registered professional nurse, a licensed practical nurse, or a nurse practitioner or a certified paramedic who is present at the scene of an accident for the purpose of rendering emergency medical service or treatment; or

(2) A qualified person employed by a licensed or certified laboratory as described in Section 50-___-___11.

(f) A person who collects or takes a specimen for a drug test shall collect an amount sufficient for two (2) drug tests as determined by the department of health.

(g) Every specimen that produces a positive, confirmed test result shall be preserved by the licensed or certified laboratory that conducted the confirmation test for a period of at least two hundred ten (210) days after the result of the test was mailed or otherwise delivered to the medical review officer.

However, if an employee or job applicant undertakes an administrative or legal challenge to the test result, the employee or job applicant shall notify the laboratory and the sample shall be retained by the laboratory until the case or administrative appeal is settled. During the one hundred eighty (180) day period after written notification of a positive test result, the employee or job applicant who has provided the specimen shall be permitted by the employer to have a portion of the specimen retested, at the employee's or job applicant's expense, at another laboratory, licensed and approved by the applicant. The second laboratory must test at equal or greater sensitivity for the drug in question as the first laboratory. The first laboratory that performed the test for the employer is responsible for the transfer of the portion of the specimen to be retested, and for the integrity of the chain of custody during such transfer.

(h) Within five (5) working days after receipt of a positive confirmed test result from the medical review officer, an employer shall inform an employee or job applicant in writing of such positive test result, the consequences of such results, and the options available to the employee or job applicant. The employer shall provide to the employee or job applicant, upon request, a copy of the test results.

(i) Within five (5) working days after receiving notice of a positive confirmed test result, an employee or job applicant may submit information to the employer explaining or contesting the test result, and explaining why the result does not constitute a violation of the employer's policy.

(j) If the employee's or job applicant's explanation or challenge of the positive test result is unsatisfactory to the employer, a written explanation as to why the employee's or job applicant's explanation is unsatisfactory, along with the report of positive result, shall be provided by the employer to the employee or job applicant; and all such documentation shall be kept confidential by the employer pursuant to Section 50-___-___10 and shall be retained by the employer for at least one (1) year.

(k) An employer may not discharge, discipline, refuse to hire, discriminate against, or request or require rehabilitation of an employee or job applicant on the sole basis of a positive test result that has not been verified by a confirmation test and by a medical review officer.

(l) An employer that performs drug testing or specimen collection shall use chain-of-custody procedures established by the department of health to ensure proper recordkeeping, handling, labeling, and identification of all specimens tested.

(m) An employer shall pay the cost of all drug tests, initial and confirmation, which the employer requires of employees. An employee or job applicant shall pay the costs of any additional drug tests not required by the employer.

(n) An employer shall not discharge, discipline, or discriminate against an employee solely upon the employee's voluntarily seeking treatment, while under the employ of the employer, for a drug-related problem if the employee has not previously tested positive for drug use, entered an employee assistance program for drug-related problems, or entered a drug rehabilitation program. Unless otherwise provided by a collective bargaining agreement, an employer may select the employee assistance program or drug rehabilitation program if the employer pays the cost of the employee's participation in the program.

(o) If drug testing is conducted based on reasonable suspicion, the employer shall promptly detail in writing the circumstances which formed the basis of the determination that reasonable suspicion existed to warrant the testing. A copy of this documentation shall be given to the employee upon request and the original documentation shall be kept confidential by the employer pursuant to Section 50-___-___10 and shall be retained by the employer for at least one (1) year.

(p) All authorized remedial treatment, care, and attendance provided by a health care provider to an injured employee before medical and indemnity benefits are denied under this section must be paid for by the carrier or self-insurer. However, the carrier or self-insurer must have given reasonable notice to all affected health care providers that payment for treatment, care, and attendance provided to the employee after a future date certain will be denied. A health care provider that refuses, without good cause, to continue treatment, care, and attendance before the provider receives notice of benefit denial commits a Class B misdemeanor.

Section 50-___-___08.

(a) If an initial drug test is negative, the employer may, in its sole discretion seek a confirmation test.

(b) Only licensed or certified laboratories as described in Section 50-___-___11 may conduct confirmation drug tests.

(c) All positive initial tests shall be confirmed using gas chromatography/mass spectrometry (GC/MS) or an equivalent or more accurate scientifically accepted method approved by the department of health or the United States food and drug administration as such technology becomes available in a cost-effective form.

(d) If an initial drug test of an employee or job applicant is confirmed as positive, the employer's medical review officer shall provide technical assistance to the employer and to the employee or job applicant for the purpose of interpreting the test result to determine whether the result could have been caused by prescription or nonprescription medication taken by the employee or job applicant.

Section 50-__-__09.

(a) An employee or job applicant whose drug test result is confirmed as positive in accordance with this section shall not, by virtue of the result alone, be deemed to have a "handicap" or "disability" as defined under federal, state, or local handicap and disability discrimination laws.

(b) An employer who discharges or disciplines an employee or refuses to hire a job applicant in compliance with this section is considered to have discharged, disciplined, or refused to hire for cause.

(c) No physician-patient relationship is created between an employee or job applicant and an employer or any person performing or evaluating a drug test, solely by the establishment, implementation, or administration of a drug-testing program.

(d) Nothing in this section shall be construed to prevent an employer from establishing reasonable work rules related to employee possession, use, sale, or solicitation of drugs, including convictions for drug-related offenses, and taking action based upon a violation of any of those rules.

(e) This section does not operate retroactively, and does not abrogate the right of an employer under state law to conduct drug tests, or implement employee drug-testing programs; however, only those programs that meet the criteria outlined in this section qualify for reduced rates under Section 3.

(f) If an employee or job applicant refuses to submit to a drug test, the employer is not barred from discharging or disciplining the employee or from refusing to hire the job applicant. However, this paragraph does not abrogate the rights and remedies of the employee or job applicant as otherwise provided in this section.

(g) This section does not prohibit an employer from conducting medical screening or other tests required, permitted, or not disallowed by any statute, rule, or regulation for the purpose of monitoring exposure of employees to toxic or other unhealthy substances in the workplace or in the performance of job responsibilities. Such screening or testing is limited to the specific substances expressly identified in the applicable statute, rule, or regulation, unless prior written consent of the employee is obtained for other tests. Such screening or testing need not be in compliance with the rules adopted by the department of labor and department of health. A public employer may, through the use of an unbiased selection procedure, conduct random drug tests of employees occupying safety-sensitive or special-risk positions if the testing is performed in accordance with drug-testing rules adopted by the department of health and the department of labor. If applicable, random drug testing must be specified in a collective bargaining agreement as negotiated by the appropriate certified bargaining agent before such testing is implemented.

(h) No cause of action shall arise in favor of any person based upon the failure of an employer to establish a program or policy for drug testing.

Section 50-___-___10.

(a) All information, interviews, reports, statements, memoranda, and drug test results, written or otherwise, received by the employer through a drug-testing program are confidential communications and may not be used or received in evidence, obtained in discovery, or disclosed in any public or private

proceedings, except in accordance with this section or in determining compensability under this chapter.

(b) Employers, laboratories, medical review officers, employee assistance programs, drug rehabilitation programs, and their agents who receive or have access to information concerning drug test results shall keep all information confidential. Release of such information under any other circumstance is authorized solely pursuant to a written consent form signed voluntarily by the person tested, unless such release is compelled by a hearing officer or a court of competent jurisdiction pursuant to an appeal taken under this section or is deemed appropriate by a professional or occupational licensing board in a related disciplinary proceeding. The consent form must contain, at a minimum:

- (1) The name of the person who is authorized to obtain the information;
- (2) The purpose of the disclosure;
- (3) The precise information to be disclosed;
- (4) The duration of the consent; and
- (5) The signature of the person authorizing release of the information.

(c) Information on drug test results shall not be released or used in any criminal proceeding against the employee or job applicant. Information released contrary to this section is inadmissible as evidence in any such criminal proceeding.

(d) This subsection does not prohibit an employer, agent of an employer, or laboratory conducting a drug test from having access to employee drug test information or using such information when consulting with legal counsel in connection with actions brought under or related to this section or when the information is relevant to its defense in a civil or administrative matter.

Section 50-__-__11.

(a) A laboratory may not analyze initial or confirmation test specimens unless:

(1) The laboratory is licensed and approved by the department of health, using criteria established by the United States department of health and human services as guidelines for modeling the state drug-testing program pursuant to this section or the laboratory is certified by the United States department of health and human services;

(2) The laboratory has written procedures to ensure the chain of custody;

(3) The laboratory follows proper quality control procedures, including, but not limited to:

(A) The use of internal quality controls, including the use of samples of known concentrations which are used to check the performance and calibration of testing equipment, and periodic use of blind samples for overall accuracy;

(B) An internal review and certification process for drug test results, conducted by a person qualified to perform that function in the testing laboratory;

(C) Security measures implemented by the testing laboratory to preclude adulteration of specimens and drug test results; and

(D) Other necessary and proper actions taken to ensure reliable and accurate drug test results.

(b) A laboratory shall disclose to the medical review officer a written positive confirmed test result report within seven (7) working days after receipt of the sample. All laboratory reports of a drug test result must, at a minimum, state:

- (1) The name and address of the laboratory that performed the test and the positive identification of the person tested;
- (2) Positive results on confirmation tests only, or negative results, as applicable;
- (3) A list of the drugs for which the drug analyses were conducted;
- (4) The type of tests conducted for both initial tests and confirmation tests and the minimum cut-off levels of the tests; and
- (5) Any correlation between medication reported by the employee or job applicant pursuant to Section 50-__-__07(b)(2) and a positive confirmed drug test result. A report must not disclose the presence or absence of any drug other than a specific drug and its metabolites listed pursuant to this section.

(c) The laboratory shall submit to the department of health a monthly report with statistical information regarding the testing of employees and job applicants. The report must include information on the methods of analysis conducted, the drugs tested for, the number of positive and negative results for both initial tests and confirmation tests, and any other information deemed appropriate by the department of health. A monthly report must not identify specific employees or job applicants.

Section 50-__-__12. The commissioner of labor shall adopt rules, using the rules adopted by the department of health and criteria established by the United States department of health and human services as guidelines for modeling the state drug-testing program, concerning, but not limited to:

- (a) Standards for licensing drug-testing laboratories and suspension and revocation of such licenses;
- (b) Body specimens and minimum specimen amounts that are appropriate for drug testing;

(c) Methods of analysis and procedures to ensure reliable drug-testing results, including standards for initial tests and confirmation tests;

(d) Minimum cut-off detection levels for each drug or metabolites of such drug for the purposes of determining a positive test result;

(e) Chain-of-custody procedures to ensure proper identification, labeling, and handling of specimens tested; and

(f) Retention, storage, and transportation procedures to ensure reliable results on confirmation tests and retests.

Section 50-___-___13. If an employee who is employed by a public employer in a safety-sensitive position enters an employee assistance program or drug rehabilitation program, the employer must assign the employee to a position other than a safety-sensitive position or, if such position is not available, place the employee on leave while the employee is participating in the program. However, the employee shall be permitted to use any accumulated annual leave credits before leave may be ordered without pay.

SECTION 3. Tennessee Code Annotated, Title 50, Chapter 6, Part 4, is amended by adding the following as a new section to be appropriately designated:

Section _____. The department of commerce and insurance shall approve rating plans for workers' compensation insurance that give specific identifiable consideration in the setting of rates to employers that either implement a drug-free workplace program pursuant to rules adopted by the division of workers' compensation of the department of labor or implement a safety program approved by the commissioner of labor or implement both a drug-free workplace program and a safety program. The plans must take effect January 1, 1997, must be actuarially sound, and must state the savings anticipated to result from such drug testing and safety programs.

SECTION 4. This act shall take effect January 1, 1997, the public welfare requiring it.

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